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TANULMÁNYOK

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Effect of European fundamental (social) rights on the national legal order. A simple roadmap

Abstract

This paper investigates the practice of the Court of Justice of the EU (ECJ) regarding the application of EU Fundamental rights in the horizontal situation, thus between two private parties. Although Article 51 of the Charter of Fundamental Rights of the European Union limits the application of the Charter to the institutions of the EU and the Member States when implementing EU Law, the CJEUhas developed a mechanism by which individuals can also rely on these fundamental rights.A successful claim results in the exclusion of the conflicting national legislation. Given this significant impact, it is essential to understand what the requirements are that need to be fulfilled for the fundamental (social) right to have this effect. However, the case law of the CJEU on this issue is complex and is becoming extensive. By applying a systematic analysis of some land mark cases, especially Mangold and Kücükdeveci, this paper reveals that the CJEU seems to follow a rather simple scheme.

1. Introduction: EU Fundamental (social) Rights and the National Legal Order

In 2000 the EU adopted the Charter of Fundamental Rights of the European Union (further: the Charter). At that time, it was considered to be merely a codification of fundamental rights in order to make them more visible.[1] The rights enshrined in the Charter are drawn from various international sources, among which human rights instruments of the United Nations and the Council of Europe, as well as national sources, including constitutional traditions of the EU Member States.[2] With the Treaty of Lisbon entering into force per 1 December 2009, the Charter gained the same legal value as the Treaties.[3] The Charter has been hailed as progressive in the sense that it doesn't follow a traditional distinction in first, second, and third generation fundamental rights,[4] instead its approach is based on the 'indivisible universal values of human

[1] T. Hervey and J. Kenner (eds. 2003), *Economic and Social Rights under the EU Charter of Fundamental Rights. A Legal Perspective.* Oxford: Hart Publishing, p. vii.

[2] *Cf.* Preamble of the Charter of Fundamental Rights of the European Union.

[3] As is declared in Article 6(1) Treaty on European Union

[4] First generation fundamental rights refer to civil and political rights, whereas second and third generation fundamental rights refer to social, economic and development rights. See more elaborate: Ph. Alston (1982), 'A Third Generation of Solidarity Rights: Progressive Development or Obfuscation of International Human Rights Law?', Vol. 29(3) *Netherlands International Law Review*, p. 307-322; and J. Krommendijk (2015),

dignity, freedom, equality and solidarity'.[5] Another characteristic of the Charter is that its application is explicitly stipulated in Article 51 of the Charter, limiting it to the conduct of the institutions of the EU and the Member States 'only when they are implementing Union law'.[6]

All together the Charter has left the legal doctrine with many questions about the meaning of the Charter in practice.[7] Not in the least concerning the way the Court of Justice of the European Union (ECJ) has given effect to this in relation to the application of directives in the horizontal situation between two private parties.[8] A remarkable move, since the standing approach of the CJEU has been that a directive, by its definition has no horizontal direct effect.[9] More particularly, in landmark case Kücükdeveci[10] the CJEU concluded that the national legislation which was in conflict with a directive provision implementing an EU fundamental right, was to be excluded from application. This raised much commotion in the legal doctrine.[11] More cases followed invoking fundamental rights, including other grounds of equal treatment (e.g. between man and woman, sexual orientation), the right to be consulted and informed, the right to paid annual leave, and the right to an effective remedy and a fair trial. In some cases, the CJEU concluded that the fundamental right invoked was having exclusionary effect, for instance equal treatment on grounds of age[12] and of gender[13] and the right to effective remedy and a fair trial[14]. In other cases, the CJEU concluded

'Principled Silence or Mere Silence on Principles? The Role of the EU Charter's Principles in the Case Law of the Court of Justice', Vol. 11 *European Constitutional Law Review*, p. 321-356.

[5] *Cf.* Preamble of the Charter of Fundamental Rights of the European Union.

[6] E. Hancox (2013), 'The meaning of "implementing" EU law under Article 51(1) of the Charter: *Åkerberg Fransson*', Vol.50 *Common Market Law Review*, p. 1411-1432.

[7] *E.g.* L. Betten (2001), 'The EU Charter of Fundamental Rights: a Trojan Horse or a Mouse?', 17 *International Journal of Comparative Labour Law and Industrial Relations*; M.P. Maduro (2003), 'The Double Constitutional Life of the Charter of Fundamental Rights of the European Union', in T. Hervey and J. Kenner (eds. 2003), *Economic and Social Rights under the EU Charter of Fundamental Rights. A Legal Perspective.* Oxford: Hart Publishing, p. 269 – 299; and S. Smismans (2009), 'The European Union's Fundamental Rights Myth', Vol. 8(1) *Journal of Common Market Studies*, p. 45-66.

[8] E.g. S. I. Sanchez (2012), 'The Court and the Charter: The impact of the entry into force of the Lisbon treaty on the CJEU's approach to fundamental rights', Vol. 49 *Common Market Law Review*, p. 1565-1612; and S. Robin-Olivier (2014), 'The evolution of direct effect in the EU: Stocktaking, problems, projections', Vol 12(1) *International Journal of Constitutional Law*, p. 165-188.

[9] CJEU 26 February 1986, C152/84 (Marshall), ECLI:EU:C:1986:84.

[10] CJEU 19 January 2010, C-555/07 (Kücükdeveci / Swedex), ECLI:EU:C:2010:21

[11] Among many others: M. Mol (2010), 'Kücükdeveci: Mangold revisited – Horizontal Direct Effect of a General Principle of EU Law: Court of Justice of the European Union (Grand Chamber) Judgement of 19 January 2010, Case C-555/07, *SedaKücükdeveci v. Swedex GmbH & Co. KG*, *European Constitution Law Review*, Volume 6, Issue 2, pp. 293-308; T. Roes (2009), 'Case C-555/07, Seda Kücükdeveci v. Swedex GMBH & CO.KG*', 16 Columbian Journal of European Law*, 497-518; and F. Fontanelli (2010), 'Some Reflections on the Choices of the European Court of Justice in the Kücükdeveci Preliminary Ruling', *Perspective on Federalism*, Vol. 2, No.2, pp. 15-23.

[12] CJEU 19 January 2010, C-555/07 (Kücükdeveci / Swedex), ECLI:EU:C:2010:21.

[13] CJEU 30 September 2010, C-104/09 *(Roca*Alvarez) ECLI:EU:C:2010:561.

[14] CJEU 12 February 2015, C-396/13 (*Sahkoalojenammattiliittory / EiektrobudowaSpółkaAkcyjna),* ECLI:EU:C:2015:86.

that the fundamental right invoked did not have this effect, for example the right to information and consultation[15] and the right to paid annual leave[16].

In some literature, this practice of the CJEU, *i.e.* giving exclusionary effect to a directive through a fundamental right, has been indicated as a third corrective on the lack of horizontal direct effect of directives.[17] Hence the terms 'Kücükdeveci-corrective' or 'Swedex-mechanism'.[18] The other two 'correctives' are 'EU law conform interpretation' and 'state liability action', doctrines that have been developed by the CJEU in the cases Marleasing[19] and Francovich[20] respectively.

When discussing the Kücükdeveci-corrective, many scholars focus on the substantive considerations of the CJEU,[21] only a few aim to fathom the Court's approach from a more procedural or formal perspective.[22] Although the former is necessary to get a better understanding of the content and scope of these rights, deeper insight about the more procedural or formal requirements concerning the application of these rights contributes to more legal certainty and clarity when relying on these rights in court. The focus of this study, therefore, lies with the formal requirements the CJEU has developed in its case-law in order to determine whether a directive involving a fundamental right can have exclusionary effect on national legislation. The study is structured as follows. First the effect of the Kücükdeveci-corrective is discussed more elaborately, including a discussion on one of the main commentaries, namely that it might conflict with the principle of legal certainty. Second the various criteria employed by the CJEU are unpacked. Rather than focussing on one main case, e.g. *Kücükdeveci*, the analysis is based on various cases of the CJEU. Based on the combined analysis of these cases the study concludes with a summary of the criteria that need to be fulfilled for a directive dealing with a fundamental right to have exclusionary effect.

2. The effect of the Kücükdeveci-corrective

The basic idea that lies at the foundation of the Kücükdeveci-corrective is that, since the claim involves a fundamental (social) right, it adds legal weight to the directive that deals with this right. Consequently, the interpretation of national legislation is not only in light of the directive, but fore mostly with the fundamental right, which national legislation ought to be in compliance with. If not, it is the fundamental right, dealt with

[15]CJEU 15 January 2014, C-176/12 (Association de MédiationSociale (AMS)), ECLI:EU:C:2014:2.
[16]CJEU 24 January 2012, C-282/10 (Dominguez) ECLI:EU:C:2012:33.
[17]A.Ph.C.M. Jaspers en S.M.M. Peters (2016), 'Sociale Grondrechten', in Pennings and Peters (eds.), *Inleiding Europees Arbeidsrecht*, Deventer: Kluwer (4th edition), p 70.
[18] These terms are derived from the names of the parties in the like-named case: CJEU 19 januari 2010, C-555/07 (Kücükdeveci/Swedex), EU:C:2010:21
[19]Marshall, 152/84, EU:C:1986:84, par. 48
[20]CJEU 19 November 1991, C-6/90 and 9/90 (Francovich e.o.), EU:C:1991:428
[21] E.g. C. Leone (2010), 'Towards a more shared parenthood? The case of Roca Alvarez in context', Vol.1(4) *European Labour Law Journal*, p. 513 – 516; E. Howard (2011), 'CJEU advances equality in Europe by giving horizontal direct effect to directives. Vol. 17(4), *European Public Law*, p. 729 – 743; and L. Pech (2012), 'Between Judicial minimalisation and avoidance: the Court of Justice's sidestepping of fundamental constitutional issues in *Römer* and *Dominguez*', Vol. 49(6) *Common Market Law Review*, p. 1841-1880.
[22] E.g. D. Schieck (2010), 'Constitutional principles and horizontal effect: Kücükdeveci revisited', *European Labour Law Journal* 2010/3, p. 368-379.

in the directive, that excludes the application of the conflicting national legislation. This interpretation can be derived from the Court's reasoning in the *Mangold*-case, in which the Court indicated that enforcement of compliance with a fundamental (social) right cannot merely depend on the applicability of the directive by which it is regulated.[23] When the Kücükdeveci-corrective is applied successfully, it results in the exclusion of the national legislation that conflicts with the directive and therefore the fundamental (social) right. In this situation, it is for the national court to 'find the law' and to issue a ruling that corresponds with the interpretation of the fundamental (social) right, and therefore the directive provision that deals with this right, as given by the CJEU.

The Kücükdeveci-corrective has raised numerous comments,[24] particularly with regard to the principle of legal certainty. Critics of the corrective argue that because of the exclusionary effect, private parties are confronted with an unexpected obligation.[25] An issue that was explicitly raised in case *Rasmussen*.[26] Rasmussen was dismissed on the age of 60 by his employer Ajos. In principle, he was entitled to a severance payment equal to three months' salary. Additionally, from the age of 60 he was also entitled to an old-age pension payable by the employer. Standing national case-law on the latter barred his entitlement to the severance payment, despite the fact that he remained active on the labour market after he left Ajos. The court in first instance (the Maritime and Commercial Court) found stated that it was clear from previous case law[27] that the respective national rule was in conflict with Directive 2000/78 and inconsistent with the general principle, enshrined in EU law, prohibiting discrimination on grounds of age.[28] Ajos appealed with the Danish Supreme Court which submitted preliminary questions to the CJEU. In one of the questions it asked whether the general EU principle prohibiting discrimination on grounds of age should be weight against 'the principle of legal certainty and the related principle of the protection of legitimate expectations', and whether it should be concluded on that bases 'that the principle of legal certainty must take precedence over the principle prohibiting discrimination on grounds of age'?[29] In this context the CJEU recalled the Member States' obligation to achieve the results envisaged by the directive and their duty to take all appropriate measures to ensure fulfilment of that obligation.[30] This includes an obligation of

[23]CJEU 22 november 2005, C-144/04 (Mangold),ECLI:EU:C:2005:709, paras 74-76

[24] Among many others: M. Mol (2010), 'Kücükdeveci: Mangold revisited – Horizontal Direct Effect of a General Principle of EU Law: Court of Justice of the European Union (Grand Chamber) Judgement of 19 January 2010, Case C-555/07, *Seda Kücükdeveci v. Swedex GmbH & Co. KG*, *European Constitution Law Review*, Volume 6, Issue 2, pp. 293-308; T. Roes (2009), 'Case C-555/07, SEDA KÜCÜKDEVECI V. SWEDEX GMBH & CO.KG*', 16 Columbian Journal of European Law*, 497-518; and F. Fontanelli (2010), 'Some Reflections on the Choices of the European Court of Justice in the Kücükdeveci Preliminary Ruling', *Perspective on Federalism*, Vol. 2, No.2, pp. 15-23.

[25] A.Ph.C.M. Jaspers en S.M.M. Peters (2013), 'Sociale Grondrechten', in S.M.M. Peters en R.M. Beltzer (red.), *Inleiding Europees Arbeidsrecht*, Deventer: Kluwer, p. 79. They base their conclusion on the fact that the exact interpretation of the fundamental (social) right is to be derived from the provision of the directive. Similar: AG Trstenjak in the case C-282/10, Dominguez, ECLI:EU:C:2011:559, para 156.

[26] CJEU 19 April 2016, C-441/14 (Rasmussen), ECLI:EU:C:2016:278.

[27] Ingeniørforeningen i Danmark (C-499/08, EU:C:2010:600).

[28] CJEU 19 April 2016, C-441/14 (Rasmussen), ECLI:EU:C:2016:278, par. 13.

[29] *Idem*, par. 20(2).

[30] *Idem*, par. 30.

national courts to interpret national legislation as much as possible in conformity with 'the wording and the purpose of the directive concerned in order to achieve the result sought by the directive'.[31] Furthermore, the CJEU reconfirmed that such interpretation of national law is limited by general principles of law and therefore cannot go *contra legem*.[32] Additionally, the CJEU noted that "the requirement to interpret national law in conformity with EU law entails the obligation for national courts to change its established case-law, where necessary, if it is based on an interpretation of national law that is incompatible with the objectives of a directive".[33] However, when the national court considers it impossible to interpret the national legislation in compliance with EU law, it follows from the cases *Kücükdeveci* and *AMS* that the national court has to disapply the national provision.[34] If the national court refuses to act accordingly, for instance because of reasons of legal certainty, it would in fact deprive an individual of the protection EU law offers.[35] Moreover, the CJEU stressed that the interpretation the CJEU gives to EU law "clarifies and, where necessary, defines the meaning and scope of that law as it must be, or ought to have been, understood and applied from the time of its coming into force".[36] With this reasoning the court indicated that its interpretations cannot conflict with the principles of legal uncertainty and the protection of legitimate expectations, and only in very exceptional occasions it may not apply to legal relationships which arose and were established before the judgement ruling on the request for interpretation.[37] Such was the situation in the *Defrenne*-case and the *Bosman*-case, but not in the *Rasmussen*-case.[38]

The above comes down to the following justification of the effect of the Kücükdeveci-corrective in relation to the general principles on legal certainty and the protection of legitimate expectations. Member States are obliged to interpret their legislation in conformity with EU law. However, this finds its limit when such interpretation would go *contra legem*. In the *Rasmussen*-case the CJEU clarified that this doesn't apply to case-law, on the contrary, since the case-law is an interpretation of the law, it falls within the obligation of the Member State to adjust its case-law into an interpretation of the national legislation that is in compliance with EU law. However, when the EU law concerns a fundamental right, which fulfils certain criteria (which will be further worked out in the next sections of this study), the national legislation that conflicts with EU law which gives concrete expression to the fundamental right, is to be set aside. In fact, the national legislation is not in conflict with just EU law, the directive, hence it is in conflict with a fundamental right. When this right fulfils certain

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[31] *Idem*, par. 31.

[32] *Idem*, par. 32, with reference to: *Impact*, C-268/06, EU:C:2008:223, par. 100; *Dominguez*, C-282/10, EU:C:2012:33, par. 25; and *Association de médiation sociale* (*AMS*), C-176/12, EU:C:2014:2, par. 39.

[33] CJEU 19 April 2016, C-441/14 (*Rasmussen*), EU:C:2016:278, par. 33; with reference to: *Centrosteel*, C-456/98, EU:C:2000:402, par. 17.

[34] *Idem,* paras. 35-37.

[35] *Cf* CJEU 19 April 2016, C-441/14 (*Rasmussen*), EU:C:2016:278, par. 41, with reference to CJEU judgements *Defrenne*, 43/75, EU:C:1976:56, par. 75, and *Barber*, C-262/88, EU:C:1990:209, paras. 44 and 45.

[36] CJEU 19 April 2016, C-441/14 (*Rasmussen*), EU:C:2016:278, par. 40.

[37] *Idem*, par. 40.

[38] *Idem*, par. 40; *Defrenne*, 43/75, EU:C:1976:56, paras. 69-75; *Bosman*, C-415/93, EU:C:1995:463, par. 144.

criteria, the individual relying on this right should not be deprived of the protection of this right, also not because of general principles of legal certainty and the protection of legitimate expectations. Moreover, the CJEU argued that in fact there is no conflict with these principles, since with its interpretations it clarifies and defines the meaning and scope of EU law, *i.e.* the fundamental right, as it must be, or ought to have been, understood and applied from the time of its coming into force. Only in very exceptional circumstances the interpretation can be limited in its temporal effect, as was for instance the situation in the *Defrenne*-case and *Bosman*-case.

The judgement in the *Rasmussen*-case has not tempered the comments on the effect of the Kücükdeveci-corrective, in particular not within the specific context of the general principles of legal certainty and the protection of legitimate expectations, and wider within the context of the competences of the CJEU in relation to that of the national supreme courts (when dealing with constitutional rights).[39] Although very understandable, one thing seems to be overlooked within these comments, namely the fact that this effect is not lightly given to EU law. Understanding the requirements that need to be fulfilled in order for EU law to have this effect, is therefore highly relevant.

3. The Requirements

In this section the requirements will be introduced that EU law needs to fulfil in order to have exclusionary effect of national legislation. The requirements are deduced from various cases of the CJEU. This means that not all requirements are explicitly addressed in all the cases. This mostly is a consequence of the fact that in its rulings the CJEU is led by the specific circumstances of the case and the questions addressed to it by the referring national court. The cases used for this analysis are drawn from the field of labour law. This is not fortuitous: the EU Charter includes a substantive number of fundamental labour rights that have also been dealt with in directives.[40] Every requirement is illustrated with positive and a negative examples of CJEU case law.

3.1 Requirement 1: Does the situation fall within the scope of EU law?

It seems an obvious condition that the situation must fall within the scope of EU law. This requirement is less straight forward as one might take it for. The situation at hand must concern not only a European fundamental right, but it also has to be worked out in some form of EU law, more particularly in a (provision of a) directive.[41]

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[39] Vas Nunes (2016) 'Tegen de wet', *ARA*; M. Rask Masden, H.Palmer Olsen, and U Sadl (2017), 'Competing Supremacies and Clashing Institutional Rationalities: The Danish Supreme Court's Decision in the Ajos Case and the National Limits of Judicial Cooperation', *iCourts Working Paper Series No. 85*; and *Forthcoming in European Law Journal (2017).*

[40] This can to a large extend be explained by the political focus of EU social policy. E.g. the 1974 Action Plan of the European Commission, which holds many issues that were later included in the Community Charter for workers of 1989. Both formed the impetus for many EU directives in the field of social policy. Many of the rights of the Community Charter are included in the EU Charter of Fundamental Rights.

[41] It is probably needless to say that the Kücükdeveci-corrective only is relevant in case of interpretation of national law in light of a directive. Provisions with direct effect (because they are unconditional and sufficiently clear enough), from the treaties, such as Article 157 TFEU on equal pay for m/w and from

This applies, for example, to the right to paid annual leave, which was the issue in the *BECTU*-case:[42] it is recognized in Article 31 of the EU Charter and regulated in Article 7 of Directive 2003/88. This also applies for age discrimination, which was central in the cases *Mangold* and *Kücükdeveci*;[43] age is one of the discrimination grounds covered by Article 21 of the EU Charter and is (further) regulated in Article 6 of Directive 2000/78.

However, since we are dealing with directives, there is a small catch, i.e. the transposition period. The main rule is that if the transposition period has not expired, national legislation doesn't have to be in conformity with EU law yet. The purpose of this period is, after all, to implement the directive into the national legal order, and more specifically, to adopt and adjust national legislation in order to implement or comply with the requirements of the directive. This issue was addressed in the *Mangold*-case.[44] At the time the CJEU had to deal with the issue of age-discrimination in the *Mangold*-case, the implementation period of framework Directive 2000/78 was not expired. Although the CJEU established this fact, it nonetheless reasoned as follows. First, the CJEU noted that the prohibition of discrimination on grounds of age concerns a general principle of EU law found in the traditions and constitutions of EU Member States. Therefore, the observance of this right cannot depend on the expiration of the implementation period of the directive solely.[45] Second, the CJEU repeated previous case law in which it ruled that "during the period prescribed for transposition of a directive, the Member States must refrain from taking any measures liable seriously to compromise the attainment of the result prescribed by that directive".[46] In such a situation, the CJEU further considered, it is "immaterial whether or not the rule of domestic law in question, adopted after the directive entered into force, is concerned with the transposition of the directive."[47] Although not stressed by the CJEU, such behaviour would be in conflict with the principle of loyalty laid down in Article 4(3) TEU. This principle includes a positive obligation for Member States to take any appropriate measure to ensure fulfilment of the obligations arising out of the Treaties or resulting from acts of the institutions of the EU. Moreover, it includes also a negative obligation for Member States, i.e. to refrain from any measure which could jeopardise the attainment of the Union's objectives.[48] The CJEU considered that the national legislation in the *Mangold*-case was in conflict with this negative obligation, meaning that

regulations (which are binding in its entirety and applicable directly in all Member States – Art. 288 TFEU), are applicable in the vertical as well as horizontal relations. *Cf. Defrenne II* C-43/75 EU:C:1976:56.

[42]CJEU 26 June 2001, C-173/99 (BECTU) EU:C:2001:356.

[43]CJEU 22 November 2005, C-144/04 (Mangold) EU:C:2005:709; CJEU 19 January 2010, C-555/07 (Kücükdeveci/Swedex) EU:C:2010:21.

[44]CJEU 22 November 2005, C-144/04 (Mangold) EU:C:2005:709.

[45] CJEU 22 November 2005, C-144/04 (*Mangold*) EU:C:2005:709, paras 74-76; and repeated in CJEU 19 April 2016, C-441/14 (*Rasmussen*), EU:C:2016:278, paras. 22-23.

[46] CJEU 22 November 2005, C-144/04 (*Mangold*) EU:C:2005:709, par. 67, with reference to: CJEU 18 December 1997, C-129/96 (*Inter-Environnement Wallonie*), EU:C:1997:628, par. 45.

[47]CJEU 22 November 2005, C-144/04 (*Mangold*) EU:C:2005:709, par. 68, with reference to: CJEU 8 May 2003, Case C-14/02 (*ATRAL*) EU:C:2003:265, paras. 58 and 59

[48] See more generally about the principle of loyalty in the EU: M. Klamert, *Loyalty in the EU Treaties*, Published to Oxford Scholarship Online: April 2014.

the State should have refrained from adopting the measure at stake, since it conflicts with the objectives of the adopted directive.[49]

Thus, even before the transposition period has expired, Member States have to take the content of a directive into account, especially when adopting new legislation. This may raise the question whether the transposition period has no meaning when a fundamental right is concerned. The *Römer*-case sheds some light on the question.[50] In this case the main claim was based on equal treatment on the grounds of sexual orientation, which is also one of the discrimination grounds listed in Article 21 of the EU Charter and is worked out in Framework Directive 2000/78. The subject for which equal treatment was sought concerned a supplemental retirement pension that is made dependent on the marital status between two partners. The CJEU considered that the subject of the claim is covered by the fundamental right and the Framework Directive. However, unlike the *Mangold*-case, the right of equal treatment could only be claimed after the transposition period of the directive had expired.[51] This time the CJEU argued that Article 13 EC (now Article 19 TFEU) on which the directive is based, nor the Directive itself enables to bring a situation as at issue in the main procedures within the scope of EU law before the expiration of the transposition time.[52] Furthermore, the CJEU reasoned that the national measure (which dated from 16 February 2001)[53] was not a measure implementing Directive 2000/78 or any other provision of EU law.[54] However, the Court further considered, should the national measure "constitute discrimination within the meaning of Article 2 of Directive 2000/78, the right to equal treatment could be claimed by an individual such as the applicant in the main proceedings at the earliest after the expiry of the period for transposing the Directive, namely from 3 December 2003, and it would not be necessary to wait for that provision to be made consistent with European Union law by the national legislature."[55]

In contrast with the *Mangold*-case, the *Römer*-case thus illustrates that the CJEU is rather restrictive when it comes to bringing a situation within the scope of EU law, before the transposition period has expired.

3.2 Requirements 2 and 3 Does the fundamental right grant a subjective right, and is this right unconditional and sufficiently clear enough?

If the situation falls within the scope of EU law, then the next requirements seem to be that the fundamental right has to grant a subjective right and that this right has to be sufficiently clear and unconditional. The fundamental right must thus not be too abstract or programmatic in nature. This is, for example, the case with the rights to

[49] CJEU 22 November 2005, C-144/04 (*Mangold*) EU:C:2005:709, para 67.
[50] CJEU 10 May 2011, C-147/08 (*Römer*) EU:C:2011:286.
[51] *Idem*, par. 57 - 62.
[52] *Idem*, par. 61, with reference to: ECL 23 September 2008, Case C-427/06 (*Bartsch*) EU:C:2008:517, paras 16 and 18; and CJEU 19 January 2010, C-555/07 (*Kücükdeveci/Swedex*) EU:C:2010:21, par. 25.
[53] *Idem*, para 9.
[54] *Idem*, par. 62.
[55] *Idem*, par. 64.

non-discrimination on the grounds of age as expressed in Article 21 of the Charter.[56] Another example is the fundamental right to paid annual leave. In the *BECTU*-case, the CJEU determined that the right to paid annual leave as formulated in Article 31 of the Charter, grants a subjective right to individuals. In the *Dominguez*-case, the Court repeats that this right is expressly granted to all employees and that the claim on the right itself cannot be subjected to conditions.[57] However, there are many modalities imaginable for the implementation of the right to paid annual leave and it is up to the Member States to set these modalities.[58] In other words, the right to paid annual leave grants a subjective right to workers, however, is insufficiently clear to rely on without further (national) measures setting the modalities by which the right can be effectuated.

In the *AMS*-case the CJEU concluded that Article 27 of the Charter on information and consultation of workers does not grant a subjective right.[59] Central in this case ware national provisions dealing with the calculation of staff members in order to determine whether certain thresholds are met to establish workers representation.[60] These provisions correspond with Article 2, sub d of Framework Directive 2002/14,[61] which defines who counts as employee in order to determine whether the (establishment of the) undertaking falls within the scope of the directive. Although the directive pays explicit attention to the definition of employee, the provision refers to the definition of employee as "any person who, in the Member State concerned, is protected as an employee under national employment law and in accordance with national practice." It is thus left up to the legislation of the Member States which persons within the undertaking qualify as employee. This renders the directive conditional, namely subjective to national legislation on the definition of employee. Moreover, the fundamental right itself in Article 27 of the Charter, includes reference to the "conditions provided for by Community law and national laws and practices."

This seems rather clear and straight forward. The right to information and consultation is made conditional in both, Article 27 of the Charter and in the Framework Directive on Information and Consultation. However, doubts could be raised whether the provision doesn't constitute a subjective right. In its ruling on the *AMS*-case an acknowledgement of this doubt could be read in paragraph 44. Here the CJEU observes that "Article 27 of the Charter, entitled 'Workers' right to information and consultation within the undertaking', provides that workers must, at various levels, be guaranteed information and consultation".[62] How this is to be guaranteed depends on the conditions provided for by Community law and national laws and practices. An

[56]CJEU 22 November 2005, C-144/04 (Mangold) EU:C:2005:709, par. 75; and CJEU 19 January 2010, C-555/07 (*Kücükdeveci/Swedex*) EU:C:2010:21, par. 21.

[57]CJEU 26 June 2001, C-173/99 (*BECTU*) EU:C:2001:356, par. 55; CJEU 24 January 2012, C-282/10 (*Dominguez*) EU:C:2012:33, paras 16-19; and CJEU 20 January 2009, joined cases C-350/06 en C-520/06 (*Schultz-Hoff e.a.*), EU:C:2009:18, par. 47.

[58] CJEU 24 January 2012, C-282/10 (*Dominguez*) EU:C:2012:33, par. 35.

[59]CJEU 15 January 2014, C-176/12 (*Association de Médiation Sociale* (AMS)), EU:C:2014:2.

[60] *Idem*, para 11, 12 and 16.

[61] Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community.

[62] Something similar is claimed about Article 28 of the EU CFR. See: K. Ewing (2004), 'Laws Against Strikes Revisited', in Barnard, Deakin and Morris (eds.) *The Future of Labour Law. Liber Amicorum Sir Bob Hepple QC*, Oxford: Hart Publishers, p. 48.

analogy can be drawn with annual paid leave: the right is to be guaranteed, under which conditions or modalities depends on further legislation.[63] In the *AMS*-case it is not the right itself that is at dispute, indeed, it are the conditions under which the (representatives of the) workers can enjoy the right to information and consultation. More particularly, the main issue is not whether representatives have a right, indeed the main issue concerns the determination of representation. The second preliminary question confirms this:

> "(2) In the affirmative, may those same provisions be interpreted as precluding a national legislative provision which excludes from the calculation of staff numbers in the undertaking, in particular to determine the thresholds for putting into place bodies representing staff, workers with [assisted] contracts?"[64]

Before moving on to the last requirement I would like to put some emphasis on keeping these two requirements separated. Although the two requirements are closely related and making it difficult to separate them, keeping them separate may create room to give extra meaning to the fundamental rights in the Charter. Let me illustrate this with the following example. As already indicated above, the CJEU leaves room to interpret Article 27 of the Charter as a subjective right: the right of workers to be informed and consulted within the undertaking.[65] What if this right would be claimed in combination with a right in a directive that is clear and unconditional? For example, Article 2, paragraph 1 of Directive 98/59 on collective redundancies.[66] This article provides that 'where an employer is contemplating collective redundancies, he shall begin consultations with the workers' representatives in good time with a view to reaching an agreement'. This provision clearly grants a subjective right to consultation, which is also recognised as such by the CJEU in various cases.[67] By separating these two steps it is possible to distinguish between two different situations. First, a situation in which a fundamental right is a subjective right which is made conditional upon further legislation, in both the Charter and the directive – as was the case in the *AMS*-case. Second, a situation in which a fundamental right is a subjective right which is made conditional upon further legislation in the Charter, but not in the directive. In the second situation the right as worked out in the directive is merely a confirmation of the fundamental right, since no further conditions are attached to it, like Article 2, paragraph 1 of Directive 98/59. In the latter situation it could be imaginable that the Article 27 of the Charter has exclusionary effect on a conflicting national measure.

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[63] In this view the Civil Service Tribunal has applied this right in the following cases: Civil Service Tribunal 30 June 2015 Case F-124/14 (*Petsch v. Commission*), ECLI:EU:F:2015:69, paragraph 44; and General Court 11 November 2014, Case T-22/14 (*Anna Bergallou v. European Parliament*), ECLI:EU:T:2014:954, paragraph 33.

[64] CJEU 15 January 2014, C-176/12 (*Association de Médiation Sociale (AMS)*), ECLI:EU:C:2014:2, paragraph 22.

[65] *Ibid*, n64.

[66] Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies.

[67]CJEU 27 January2005, C-188/03 (Junk) EU:C:2005:59;and CJEU 10 September 2009, C-44/08 *(Fujitsu Siemens),* EU:C:2009:533.

However, this is a hypothetic situation and admittedly a rather technical exercise which remains fictional for as long as the CJEU has not taken another stand as it did in the *AMS*-case. Furthermore, while commenting on the way how the CJEU put two requirements more or less together, I am doing the same in this hypothetical situation, since I actually give more meaning to the fourth requirement, reading it in combination with the second and the third.

3.3 Requirement 4. How concretely is the fundamental right worked out in the directive?

This is the point where directives get indirect horizontal effect. In fact, the directive in this construction is considered to be a further specification of the fundamental right.[68] The test is about to what extent the (provision of the) directive is unconditional and sufficiently clear enough to be directly relied on.

Examples where the CJEU found the (provision of the) directive conditional or insufficiently clear enough concern the right to paid annual leave (Article 31 of the Charter) and the right to information and consultation (Article 27 of the Charter). As discussed before, concerning the right to paid annual leave, the CJEU considered that the right itself is a subjective right which cannot be made conditional, however, it is subjected to various modalities of execution to be determined by the Member States, which renders the right insufficiently clear. Article 7 of the Working Time Directive[69] reads exactly the same as the right formulated under Article 31(2) of the Charter. As such, it (merely) confirms the fundamental right, including its openness with regard to the modalities of execution.[70]

The findings of the CJEU in the *AMS*-case, concerning the right to information and consultation, were even more clear. Not only did the CJEU find Article 27 of the Charter insufficiently clear and conditional, Article 2, sub d of Directive 2002/14 is even more explicitly conditional since it stipulates that ""employee" means any person who, in the Member State concerned, is protected as an employee under national employment law and in accordance with national practice."

As already elaborated in section 3, it is on precisely this point that Article 27 of the Charter can possibly be evaluated differently when the conditionality is not in the directive. Which is for instance the case with Article 2, paragraph 1 of Directive 98/59 on collective redundancies However, would the legal issue be a different one, for example, who accounts as representative of the workers, this directive too would render the fundamental right conditional. Article 1, par. 1, sub b of Directive 98/59 defines "worker representatives" as "the worker representatives provided for by the laws or practices of the Member States." The end result would thus be the same as it was with the *AMS*-case. However, this can at best mean that a certain representative of the workers is excluded from the right, because this person is not recognized by national

[68] *Cf* CJEU 19 January 2010, C-555/07 (Kücükdeveci / Swedex), ECLI:EU:C:2010:21, para 21.
[69]. Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time.
[70] Cf. CJEU 26 June 2001, C-173/99 (BECTU) ECLI:EU:C:2001:356, para 55; CJEU 24 January 2012, C-282/10 (Dominguez) ECLI:EU:C:2012:33, para 19

standards. The right to information and consultation itself, as laid down in Article 2, paragraph 1 of Directive 98/59 remains unencumbered.

Two things are thus important to keep in mind with this last requirement. First, it is about the concreteness of a specific provision of a directive, rather than the directive in general. Second, so far the CJEU has been very strict with its interpretations and evaluations of the fundamental rights. It could be argued that with this restrictive approach the CJEU proves to be well aware of the far reaching effect of allowing a (provision of a) directive dealing with a fundamental (social) right to exclude a national provision. Article 21 of the Charter is one of the few that has been granted this effect. In these cases *Mangold* and *Kücükdeveci*, the Court judged that the right to equal treatment on the grounds of age is anchored in the EU Charter and that Framework Directive 2000/78 only concretises this. Article 6 of the Framework Directive leaves the Member States a broad margin of discretion in terms of justifying the age-discrimination with a legitimate aim and proving that the discriminatory rule is necessary and proportionate to achieve that legitimate aim. With respect to the content of the measure Member States thus have considerable room for action, however, the way how a discriminatory rule (or practice) can be justified is clear and unconditionally regulated by the directive. Therefore, Article 6 of the Framework Directive is sufficiently clear and unconditional, and since it concerns a recognised principle of EU law, codified in Article 21 of the Charter, it can have the effect of excluding the conflicting national provision.

Other grounds addressed in Article 21 of the Charter have been speculated to also have exclusionary effect, i.e. disability and sexual orientation.[71] A reserved approach, however, seems appropriate when it comes to the discrimination ground 'belief', given that there can still be discussion about what a 'belief' is. For instance: Is veganism a belief?[72]

Exclusionary effect has also been given to Article 47 of the Charter (right to an effective remedy and to a fair trial). This right was briefly dealt with in the *Elektrobudowa Spółka Akcyjna* (*ESA*)-case.[73] In this case Polish workers who were posted to Finland, claimed certain working conditions of the Finnish collective labour agreement. They were entitled to these rights based on the Posting of Workers Directive[74] and had ceded their claim to these rights to the Finnish trade union Sähköalojen ammattiliitto ry. The Polish employer, ESA, asked the Finnish Court to declare itself not competent to deal with the case, since Polish law prohibits that claims under labour law are transferred. The Polish trade union argued that if the Finnish Court would not deal with the case, the Polish workers would be deprived from their fundamental right to have access to a fair trial since no other court could deal with the case. With reference to Article 47 of the Charter and Article 6 of the Posting of Workers Directive, the CJEU declared that

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[71] SMM Peters, 'Sociale Grondrechten', in FJL Pennings and SMM Peters (eds), *Europees Arbeidsrecht*, Deventer: Wolters Kluwer (2016), p. 74.

[72] E.g. S Bruers, 'The Core Argument for Veganism', 43 *Philosophia* (2015), 271-290; and DD Page, 'Veganism and Sincerely Held "Religious" Beliefs in the Workplace: No Protection Without Definition', 7 *University of Pennsylvania Journal of Labor and Employment Law* (2005), 363.

[73] CJEU 12 February 2015, C-396/13 (*Sahkoalojenammattiliittory/ElektrobudowaSpółkaAkcyjna),* ECLI:EU:C:2015:86, point26.

[74] Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services.

the Finnish Court should be competent. Consequently, the Polish legislation prohibiting the transfer of the labour law claims was excluded from application.

4. Closing remarks

While the CJEU stressed in the *Rasmussen*-case that in principle national courts are obliged to interpret national legislation in conformity with EU law, there will be situations in which this will not be possible. If such a situation concerns a fundamental right, this may result in the exclusion of national legislation. This effect, the exclusion of national legislation, has been indicated with the "Kücükdeveci-corrective" or "Swedex-mechanism". Many studies and commentaries on such cases have indicated that these cases are rather complex. This study took another approach and analysed the CJEU's case-law from a more formal or procedural point of view. The result of this analysis is the identification of four requirements the CJEU seems to check in order to evaluate possible exclusionary effect of EU fundamental rights. These are:

1) Does the situation fall within the scope of EU law?
2) Does the fundamental right grant a subjective right?
3) Is the fundamental right unconditional and sufficiently clear enough?
4) How concretely is the fundamental right worked out in the directive?

These requirements will not make these cases less complex, however, they do help to get a little grasp on how the CJEU operates in such cases. Furthermore, the analysis indicates that the CJEU interprets these requirements strictly. This means that the CJEU does not easily accept the fulfilment of each of the requirements, as well as that all requirements need to be fulfilled. Since the Charter includes rights and principles it is not easy to predict which of the rights and principles will have the potential of exclusionary effect. And even those rights the CJEU already dealt with may be inconclusive as I argued with the hypothetical example of Article 27 of the Charter. Although these formal requirements are of little assistance in the assessment of the merits of these cases, they are of help in understanding what needs to be assessed.